No. 11,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellant,

vs.

WILLIAM K. CARSON,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This action was instituted by the appellee to recover damages for personal injuries which he sustained while working as a brakeman for the appellant. He was injured when a brake club that he was using to set a handbrake on a tank car broke, and caused him to be thrown against the end of the car. The action was filed pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq. A verdict was returned by the jury in favor of the appellee and judgment was entered in accordance with the verdict. Thereafter the appellant filed a motion for a new trial which was heard and denied by the trial Court.

The appellant has made three specifications of error but has combined two of them in its argument so just two are presented; the first specification is that the trial court erroneously instructed the jury with reference to the application of the Safety Appliance Act, 45 U.S.C.A. 11, et seq.; the second specification being that the evidence was insufficient to support the verdict.

The facts as set out by the appellant contain not only evidence introduced by the appellee but also conflicting and contrary evidence introduced by the appellant. This violates the established rule that Appellate Courts will accept the evidence offered by the prevailing party as true, together with all reasonable inferences to be drawn therefrom in disregard of any adverse showing made by the appellant.

> "If, disregarding all adverse evidence and giving credit to all evidence favorable to him and indulging in every legitimate conclusion favorable to him which may be drawn from the facts proved, it supports the verdict, the verdict must be sustained."
>
> *Henwood v. Neal,* 198 S. W. (2d) 125;
>
> See also 29 Marquette Law Review (Feb., 1946) 73.

With the above rule in mind appellee here states the evidence with all inferences reasonable drawn favorable to appellee.

FACTS.

Hereafter the appellee will be designated as "plaintiff" and the appellant will be designated as "defendant."

The plaintiff was a yardman who had worked for the defendant for a period of time a little in excess of two years (T. R., p. 41). He was injured in the defendant's North Yard at Tucson, Arizona, in the morning of February 2, 1947. (T. R., p. 41.) Plaintiff was engaged in switching a cut of cars, which consisted of a box car and two tank cars. (T. R., pp. 41, 42.) It was plaintiff's duty to ride this cut of cars and stop it or "tie" it down, in the clear of the switch points. (T. R., p. 42.) He was on one of the tank cars which was equipped with what is known as a staff brake, and he was to wind up this brake so that the cars would be held and stopped on the track in the clear of the switch point. (T. R., p. 42.)

Although this type of brake is called a hand brake it was necessary to use a brake club to set the brake. (T. R., p. 42.) The cars could not be held by setting the brake by hand. (T. R., pp. 46-47.)

As plaintiff attempted to "tie" down the cars using his brake club in the spokes of the wheels on the hand brake (T. R., p. 62) the brake club broke and plaintiff was thrown against the end of the tank car upon which he was riding. (T. R., p. 47.)

The brake club is a piece of hickory about thirty-two inches long, round at one end and tapered at the other. (T. R., p. 47.) Plaintiff had obtained the

brake club from the brake club can located in front of the defendant's yard office. (T. R., p. 47.) At the time that the brake club broke, plaintiff was using normal force in attempting to set the brake. (T. R., p. 52.) The club was not new. It had been used and replaced in the can by the defendant's supply man. (T. R., p. 53.)

The brake clubs are placed in the can in front of defendant's yard office by the supply man of the defendant. (T. R., p. 72.) The brake club is a necessary part of the equipment to set the hand brakes. (T. R., pp. 71-72.) The hand brake of the type plaintiff was operating will not operate efficiently without a brake club. (T. R., p. 76.)

The club used by plaintiff was too light to sustain the strain put on it and when normal pressure was placed upon the club it broke squarely in two. (T. R., pp. 84-85.)

The brake clubs are purchased by the defendant from a reputable dealer (T. R., p. 141) and one out of every twenty in a shipment obtained by the defendant is tested (T. R., p. 131) and if the one club passes the test the other nineteen are sent out for general use. (T. R., p. 140.) The clubs are tested and considered safe by the defendant railroad company if they withstand five hundred pounds minimum pressure. (T. R., pp. 132-133.) The company has set a five hundred pound pressure as a minimum without knowing how much pressure is exerted by the men who use them in stopping and "tying" down freight

cars. (T. R., p. 139.) There is no other test made of the brake clubs. If they are used and re-used the defendant railroad company does nothing to check what use the clubs have been put to nor what strains have been placed upon them (T. R., pp. 113, 139) even though a pressure of five hundred pounds will destroy their efficiency. (T. R., p. 133.)

THE BASIS OF PLAINTIFF'S CASE.

The plaintiff tried this action upon the theory that the defendant failed to exercise ordinary care to supply plaintiff with a proper, adequate and efficient appliance with which to perform his required duties. It further developed from the evidence as introduced at the trial that the handbrake on the tank car in question was not operating efficiently because it was necessary to use a brake club, which was supplied by the defendant, to set the brake. The record contains ample evidentiary support for the verdict of the jury.

ARGUMENT.

A. THE COURT DID NOT ERR BY INSTRUCTING THE JURY CONCERNING THE SAFETY APPLIANCE ACT.

The trial Court did not commit error by giving the following instruction:

> "If you find from a preponderance of the evidence that the handbrake on the tank car in question would not operate efficiently without the use

of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the handbrake on the tank car, then and in that event only, you may apply the following instructions which I will give you.

Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded."

This instruction did not state that the defendant would be liable if the brake club in question broke. All that this instruction told the jury was that if there was a violation of the provisions of the Safety Appliance Act, (45 U.S.C.A. 11, et seq.), then contributory negligence, if any, upon the part of the plaintiff which was a concurring, proximate cause of injury to the plaintiff was to be disregarded. In other words, plaintiff did not at any time rely wholly upon a violation of the provisions of the Safety Appliance Act (45 U.S.C.A. 11, et seq.) as a basis for a recovery, although, as will be pointed out later, under the evidence the plaintiff was entitled to the full benefits of the Safety Appliance Act.

The uncontradicted evidence shows that the brake in question was a hand brake but that it would not operate efficiently by hand.

"Q. (Of Mr. Daniel J. Byrne, Jr.) Now all these brakes are hand brakes?

A. Yes, sir.

Q. Do you use any other kind of equipment? Do you have any other kind of equipment to set them?

A. Yes, a club.

Q. Where did you get the clubs?

A. We generally pick them up at a place where they have them for us.

Q. Just speak up.

A. They generally have them in a can or on an engine where we can pick them up.

Q. Who puts them in the can there?

A. The supply man generally fills up the can.

Q. And he is the supply man for the Southern Pacific Company?

A. Yes, sir.

Q. Is this the type of club that is supplied to you?

A. (Examining club.) Yes, sir.

* * * * * * *

Q. Now, Mr. Byrne, is it possible to set those brakes by a single use of the hands without the aid of a club?

A. No, sir.

Q. You have to use the club to set that type of brake?

A. Yes, sir."

(T. R., pp. 71-72.)

The defendant recognized that the staff type of brake would not operate properly without a brake club and in consequence the defendant furnished this additional equipment for the men to use in order that the brakes might be efficiently operated.

"Q. (Of Mr. Voleny Barnett.) Now what type of brake was on this—you went over to the oil car, did you, or the tank car?

A. That is true.

Q. What type of brake did it have on it?

A. Staff brake.

Q. Is that a hand operated brake?

A. Well, they are commonly called hand brakes.

Q. Can you set them properly by hand?

A. Not in the Tucson yard.

Q. What are you required to use to set them?

A. A club.

* * * * * * *

Q. Can the brake be used efficiently without the use of a brake club?

A. Well, not in the Tucson yard, they cannot.

Q. In other words, the brake will not operate efficiently unless a brake club is used, is that correct?

A. Yes."

(T. R., pp. 75-76.)

"Q. (Of plaintiff.) Where did you say you got the brake club?

A. From the front of the yard office, the brake club can."

(T. R., p. 47.)

"Q. (Of Mr. Daniel J. Byrne, Jr.) Where did you get the clubs?

A. We generally pick them up at a place where they have them for us.

Q. Just speak up.

A. They generally have them in a can or on an engine where we can pick them up.

Q. Who puts them in the can there?

A. The supply man generally fills up the can.

Q. And he is the supply man for the Southern Pacific Company?

A. Yes, sir.

Q. Is this the type of club that is supplied to you?

A. (Examining club.) Yes, sir."

(T. R., pp. 71-72.)

The evidence was uncontradicted that the brake club was a necessary part of the brake equipment, and the brake club was supplied to the plaintiff by the defendant for the purpose of making the so called hand brake operate efficiently. Under like circumstances where a placard board on an auxiliary tank car was customarily used as a handhold it was held that the placard board was one of the appurtenances of a locomotive so that the provisions of the Federal Safety Appliance Act applied, to wit, the Federal Boiler Inspection Act, 45 U.S.C.A. 23.

> "In this regard the Employers' Liability Act provides and the jury was instructed to the effect that a common carrier engaged in interstate commerce is liable in damages for the injury to or death of its employees, 'resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, etc.'; also that in any action for damages brought under the authority of said act the employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier 'of any statute enacted for the safety of employees contributed to the injury or death of such employee.' The Boiler Inspection Act provides and the jury

was instructed to the effect that 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, and the same may be employed in the active service of such carrier without unnecessary peril to life or limb. * * *' And it has been held, and the jury in the present case was instructed, that the phrase 'In the service to which the same are put', *as contained in section 2 of the Boiler Inspection Act, must be taken to mean the service for which the appliance is designed, or to which it is put with the employer's knowledge and acquiescence.* (Italics ours.) (Chicago, B. & Q. Ry. Co. v. Murray, 40 Wyo. 324 (277 Pac. 703) citing many authorities.)''

Edgington v. S. P. Co., 12 C. A. (2d) 200.

The test laid down by the *Edgington* case is how the appliance was used with the knowledge and consent of the employer. The brake club here was an appliance used with the knowledge and consent of the employer, and it was supplied to the employee for the purpose of making the brake work.

The gist of the defendant's argument in this action is that there was no violation of the Safety Appliance Act because that Act does not mention a brake club as being part of the braking equipment. Putting it another way, the argument is that because the brake itself had no mechanical or structural defects there was no violation of the Safety Appliance Act and

hence the instruction which was given was not proper under the evidence.

Defendant argues that even though the evidence is uncontradicted that the hand brake could not be operated efficiently without the use of the brake club.

The recent decisions of the United States Supreme Court are opposed to such an argument. They hold that the Safety Appliance Act is broader in its scope and liability can be based upon that Act without proof of a mechanical or structural defect.

> "From various cases denying recovery under the act respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate * * * without unnecessary peril to life or limb.' Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation."
>
> *Lilly v. Grand Trunk Western R. Co.,* 317 U. S. 481, 87 L. Ed. 411.

Clearly under the above authorities plaintiff was entitled not only to the instruction which was given but to an instruction that violation of the Safety Appliance Act would place an absolute liability upon the defendant. The evidence is uncontradicted that the brake club was recognized as a necessary part of the braking equipment of the type of brake involved in this accident and that in recognition of this fact the defendant actually supplied the men with this necessary appurtenance.

B. THERE WOULD BE NO ERROR EVEN IF THE EVIDENCE DID NOT SUPPORT THE GIVING OF THE INSTRUCTION SPECIFIED.

Even if the instruction was not properly given by the Court, the verdict that was returned was general and there is ample evidence in the record to support a recovery under the general provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq.

Where an action is based on several statutes and a general verdict is returned, such verdict will be sustained if it appears from the evidence that any one of the statutes was violated.

> "* * * And it is well settled that where an action is based on the alleged violation of civil statutes, and a general verdict is rendered in favor of plaintiff, such verdict will be sustained if it appears that any one of said statutes was violated. (Walton v. S. P. Co., 8 Cal. App. (2) 290; 48 P. (2) 108.)"
>
> *Edgington v. S. P. Co.,* 12 Cal. App. (2d) 200.

This is the rule even though the jury may have been erroneously instructed on one of the causes of action unsupported by the evidence.

"As to the other charge, that the ditcher was negligently maintained, the evidence shows that the *axle* transmitting power to one set of wheels was *broken,* and it is a fair inference from the testimony that due to this condition the movement forward and backward on the rails would not be as readily subject to control as would otherwise have been the case. However, *the record clearly shows that notwithstanding this, the movement forward was stopped immediately upon the discovery by the engineer of the fact of the accident.* It would appear, therefore, as defendants claim, that the evidence does not reasonably support the conclusion that the accident was caused or aggravated by said defect or might have been avoided had it not existed. We are unable to agree with defendants, however, that failure of plaintiff to establish liability under this latter charge of negligence serves as ground for reversal of the judgment. As said by this court in affirming the judgment in Walton v. Southern Pacific Co., 8 Cal. App. (2d) 290 (48 Pac. (2d) 108), involving a similar situation in an action founded also on federal statutes: 'It is settled that *where suit is brought upon two different theories, if there is evidence to sustain either of them and the verdict of the jury be a general one, the general verdict will stand.* * * *' (Italics ours.)

"Defendants (in their supplemental points and authorities) concede that the Walton case 'is squarely against' the position they have taken on

this point, but they contend that the portion of the decision above quoted 'is clearly wrong on principle;' and in a later brief they cite cases which they claim support their view. We have found nothing in any of those cases nor in the arguments advanced by defendants in connection therewith to warrant the conclusion that the doctrine quoted from the Walton case is not the settled law of this state, in this class of cases; and the authorities are abundant showing that it is. In California Jurisprudence (Vol. 19, p. 675) the law upon the subject is summarized as follows: 'A statement in a complaint of several distinct acts of negligence does not render the pleading subject to either a general or a special demurrer. In such a case a plaintiff may rely upon any one of the alleged acts of negligence as the proximate cause of his injury or upon all of said acts as operating together or concurrently in causing the damage. Accordingly, where several acts are pleaded, a general verdict for the plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to justify it upon one of the issues. Where each of the acts pleaded constitutes a separate cause of action, they should be separately stated, but a failure to do this merely renders a complaint demurrable upon that ground; it does not render the complaint subject to a general demurrer, or to a special demurrer for uncertainty.' Furthermore, the doctrine set forth in the Walton case was restated and again applied by this court in the case of Edgington v. Southern Pacific Co., 12 Cal. App. (2d) 200 (55 Pac. (2d) 553), which was also based on federal stat-

utes; and numerous cases may be found not involving federal statutes but based nevertheless on two or more issues of fact, wherein the same doctrine has been declared and applied. Among them are Sessions v. Pacific Imp. Co., 57 Cal. App. 1 (206 Pac. 653), and Merrill v. Kohlberg, 29 Cal. App. 382 (155 Pac. 824) cited in the Walton case; also Worley v. Spreckels Bros. Com. Co., 163 Cal. 60 (124 Pac. 697); Criss v. Angelus Hospital Assn., 13 Cal. App. (2d) 412 (56 Pac. (2d) 1274); Hume v. Fresno Irrigation Dist., 21 Cal. App. (2d) 348 (69 Pac. (2d) 483). *And it has been definitely held that said doctrine is controlling, notwithstanding reversible error may have been committed by the trial court in dealing with the unsupported issue* (Hume v. Fresno Irr. Dist., Supra), *one of the cases so holding being where the trial court erroneously refused to instruct the jury that there was no evidence to sustain such issue* (Criss v. Angelus Hospital Assn., supra). (Italics ours.) Moreover, an examination of the various cases discloses that in applying said doctrine the courts have not discriminated between cases like the present one wherein the complaint sets forth two (or more) acts of negligence in one count (Verdelli v. Gray's Harbor etc. Co., 115 Cal. 517 (47 Pac. 367, 778); Criss v. Angelus Hospital Assn., supra; Camozzi v. Colusa Sandstone Co., 26 Cal. App. 74 (147 Pac. 107)), and those like the Walton case, wherein each negligent act is made the subject of a separate count (Sessions v. Pacific Imp. Co., supra; Merrill v. Kohlberg, supra). It has been applied with equal force to both."

King v. Schumacher, 32 Cal. App. (2d) 172.

There was ample evidence to support a recovery under the provisions of the Federal Employers' Liability Act which requires that negligence on the part of the defendant be established.

C. EVIDENCE SUFFICIENT TO SUSTAIN THE VERDICT.

There was ample evidentiary basis for the jury's verdict. All that the Appellate Court should be concerned with is whether there is evidence which is contradicted or uncontradicted from which a reasonable inference could be drawn that would support plaintiff's right to a recovery.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."
>
> *Lavender v. Kurn,* 326 U. S. 713, 66 S. Ct. 232, 90 L. Ed. 421.

The defendant was under a continuing duty to exercise ordinary care to see that instruments and appliances furnished for use of the plaintiff were in a reasonably safe condition and it was the duty of the defendant to have the brake club in question inspected and tested from time to time.

"In addition to this, the simple tool doctrine no longer applies to actions brought under the Employers' Liability Act. In the case of Jacob v. City of New York, 315 U. S. 752, 62 S. Ct. 854, 856, 86 L. Ed. 1166, the Supreme Court said: '* * * the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application, suggests that it should not apply to cases arising under legislation, * * * designed to enlarge in some measure the rights and remedies of injured employees.'

In the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 446, 87 L. Ed. 610, 143 A. L. R. 967, the Supreme Court said:

'We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent of non-negligence. We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U.S.C.A. 1, et seq. 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another

name;' and no such result can be permitted here. * * * Other complications arose from the introduction of * * * 'simple tool,' and * * * concepts into the assumption doctrine. In the disposition of cases the question of a plaintiff's assumption of risk has frequently been treated simply as another way of appraising defendant's negligence, as was done by the Court below in the instant case.

'It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it is called. The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed.' (Emphasis added.) Cf. Griswold v. Gardner, 7 Cir., 155 F. (2d) 333.

I conclude that the plaintiff suffered his injuries because the defendant was negligent in not exercising ordinary care to supply the plaintiff with a proper, adequate, efficient and safe tool, reasonably suitable for the plaintiff's use in the service he was directed to perform by the defendant."

Pitt v. Pennsylvania R. Co., 66 Fed. Sup. 443 at 446.

"As employers they were under the duty of exercising ordinary care in furnishing the plaintiff with reasonably safe appliances with which to work and a reasonably safe place in which to perform his services. But this was not the limit of their duty toward the plaintiff. They were

under the continuing duty of exercising ordinary care to see that the instrumentalities and appliances furnished for the use of plaintiff, as well as the premises where he was required to work, were maintained in a reasonably safe condition. Phillips Petroleum Co. v. Manning, 8 Cir., 81 Fed. (2d) 849. It was, therefore, their duty to have the appliances so furnished inspected from time to time."

Lowden v. Hanson, 134 Fed. (2d) 348.

The brake club in question broke squarely in two. There was no evidence that this club had ever been inspected. The only inspection given any brake club was by selecting just one out of twenty new clubs and subjecting that one club to a minimum test of five hundred pounds, then placing the nineteen remaining clubs in use without any further test whatsoever.

It must be kept clearly in mind that a minimum of five hundred pounds was set without the company knowing what pressure the men who used the clubs asserted on them while setting or "tying" down brakes.

"Q. (Of Mr. Graham, defendant's expert witness.) How much pressure does the ordinary brakeman exert on a club such as that?

A. That is something that has never been determined.

Q. You have never determined that?

A. No, sir.

Q. Yet you say that a safe test would be 500 pounds?

A. That is what we have taken for granted." (T. R., p. 138.)

The jury could have found that the original test of these brake clubs was inadequate, even though the clubs were purchased from a reputable concern. It is to be noted particularly that there was no evidence to show that these clubs when purchased from the manufacturer were guaranteed.

The club that was used by the plaintiff which broke was not a new club.

> "Q. (Of plaintiff.) Now when you selected this club from the can, state whether or not it was a used club or a new club.
>
> A. It was a used club, it was almost new. I figured it was all right.
>
> Q. But it had been used?
>
> A. Yes, sir."
>
> (T. R., p. 53.)

In other words, the club selected by the plaintiff was one which had been used by other trainmen and was placed in the receptacle for other clubs to be used by other brakemen without any test to determine whether or not its efficiency had been destroyed by previous use or whether it was in a condition due to any other cause so that it could be used with safety by the men required to use it, and as pointed out supra, the law places a continuing duty upon the defendant under such circumstances to give inspections and to see that tools supplied to the workmen are safe to be used for the purpose for which they are supplied.

See *Pitt v. Pennsylvania Ry.,* supra.

There was only the one test made when the clubs were first supplied to the defendant.

"Q. (Of Mr. Graham.) As far as any test is concerned at the actual scene where the club is used and reused, you know nothing about those tests?

A. That is right.

Q. And these clubs are sent out as being safe when you take one out of 20 and if it passes inspection the other 19 go out to be used?

A. That is universally accepted with all inspection.

Q. Whether or not they are going to exert more than 500 pounds on each club, you don't know that?

A. No, sir."

(T. R., pp. 139-140.)

"Q. (Of Mr. Barnett.) As far as any test being given by the supply man who puts them out, state whether or not any is given.

* * * * * * *

Did you see or observe any tests being made by any of the supply men at any time while you were working out there at the Tucson yards?

A. I have not."

(T. R., pp. 112-113.)

That the club was not proper for the purpose for which it was supplied plaintiff by the defendant was amply proven by the fact that when it was used in the ordinary manner, it broke squarely in two.

"Q. (Of plaintiff.) Now getting back to the time of the accident, Mr. Carson, just describe the force that you were using at the time the club broke.

A. I was just using normal force, the same as I had used all morning, or that I used all the time.

Q. Anything unusual that you were doing?
A. No, sir."
(T. R., p. 52.)

Plaintiff's expert, William D. Jacobs, testified, and this evidence was not contradicted by any of defendant's witnesses, that by lifting and feeling the club an experienced man could have determined that it was too light for the purpose for which it was supplied to the plaintiff and that if ordinary pressure was exerted it would break.

"Q. Now, by picking that club up, can you tell whether or not it is strong enough to use in the ordinary braking operations?

* * * * * * *

A. Well, this club is too light to be of a good grade of wood that will sustain the strain that is put on a brake club when it is applied with any degree of force."
(T. R., p. 83.)

"Q. In other words, you are just picking up a club and feeling it in your hand and saying it doesn't feel heavy enough to me?
A. I say because I have seen brakes like that being broken before and breaking them myself before.
Q. You just simply picked it up and after holding it in your hand you say you don't think it is quite heavy enough?
A. That is right, I don't think it is heavy enough.
Q. And you say that you also base your opinion on the fact that you have seen other clubs that are broken?

A. Many of them; yes, sir.
Q. And you have seen all sizes broken?
A. I have."
(T. R., p. 84.)

The jury could have found from this evidence that an experienced supply man or one accustomed to the use of clubs such as plaintiff's expert witness could have discovered the insufficiency of this club by a simple inspection and the law holds, as previously pointed out, that the defendant was under a continuing duty to inspect appliances supplied to their employees.

See *Pitt v. Pennsylvania Ry.,* supra;
Lowden v. Hanson, supra.

CONCLUSION.

It is respectfully submitted that there was no error committed by the trial Court in the giving of the instruction specified as error and that there is ample evidentiary basis for the verdict of the jury and plaintiff respectfully urges that the judgment be affirmed.

Dated, Oakland, California,
April 24, 1948.

Respectfully submitted,
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